

UNITED STATES DISTRICT COURT RECEIVED
DISTRICT OF SOUTH CAROLINA CLERK OF COURT

2005 APR 22 P 2:29

David Jimmy Jones, #146925,

Plaintiff,

vs.

Newberry County;
South Carolina Department of Corrections; and
Jon Ozmint, Director, SCDC,

Defendants.

) C/A No. 9:05-761-17BG
) DISTRICT OF SOUTH CAROLINA
) CHARLESTON SC

) Report and Recommendation

The plaintiff, David Jimmy Jones (Plaintiff), proceeding *pro se*, brings this action pursuant to 42 U.S.C. § 1983.¹ Plaintiff is an inmate at Allendale Correctional Institution, a facility of the South Carolina Department of Corrections (SCDC), and files this action *in forma pauperis* under 28 U.S.C. § 1915. Plaintiff claims unlawful imprisonment beyond his sentence, and requests monetary damages. The complaint names as defendants Newberry County², SCDC, and the Director of SCDC. Plaintiff fails to state a claim against these defendants, and the complaint should be dismissed.

Pro Se and In Forma Pauperis Review

Under established local procedure in this judicial district, a careful review has been made of the *pro se* complaint pursuant to the procedural provisions of 28 U.S.C. § 1915; 28 U.S.C. § 1915A; and the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996). This review has

¹ Pursuant to the provisions of 28 U.S.C. §636(b)(1)(B), and Local Rule 73.02(B)(2)(d), D.S.C., the undersigned is authorized to review such complaints for relief and submit findings and recommendations to the District Court.

² Plaintiff names "Officials Newberry County" in the caption of his complaint, but allegations within the complaint are against "Newberry County," rather than named individuals. The docket correctly reflects the defendant as Newberry County.

been conducted in light of the following precedents: Denton v. Hernandez, 504 U.S. 25 (1992); Neitzke v. Williams, 490 U.S. 319, 324-25 (1989); Haines v. Kerner, 404 U.S. 519 (1972); Nasim v. Warden, Maryland House of Correction, 64 F.3d 951 (4th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1177 (1996); Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1983).

The complaint herein has been filed pursuant to 28 U.S.C. § 1915, which permits an indigent litigant to commence an action in federal court without prepaying the administrative costs of proceeding with the lawsuit. To protect against possible abuses of this privilege, the statute allows a district court to dismiss the case upon a finding that the action “fails to state a claim on which relief may be granted” or is “frivolous or malicious.” § 1915(e)(2)(B)(i), (ii). A finding of frivolity can be made where the complaint “lacks an arguable basis either in law or in fact.” Denton v. Hernandez, 504 U.S. 25, 31 (1992).

This Court is required to liberally construe *pro se* documents, Estelle v. Gamble, 429 U.S. 97 (1976), holding them to a less stringent standard than those drafted by attorneys, Hughes v. Rowe, 449 U.S. 9 (1980) (*per curiam*). Even under this less stringent standard, however, the *pro se* complaint is subject to summary dismissal. The mandated liberal construction afforded to *pro se* pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so, but a district court may not rewrite a petition to include claims that were never presented, Barnett v. Hargett, 174 F.3d 1128, 1133 (10th Cir. 1999), or construct the plaintiff's legal arguments for him, Small v. Endicott, 998 F.2d 411, 417-18 (7th Cir. 1993), or “conjure up questions never squarely presented” to the court, Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985), *cert. denied*, 475 U.S. 1088 (1986). The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts

which set forth a claim currently cognizable in a federal district court. Weller v. Department of Social Services, 901 F.2d 387, (4th Cir. 1990).

Discussion

Plaintiff names SCDC as a defendant in this civil rights action, but SCDC is immune from suit filed pursuant to 42 U.S.C. § 1983. The Eleventh Amendment to the United States Constitution divests this court of jurisdiction to entertain a suit brought against the State of South Carolina or its integral parts, such as a state agency or department. The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

See Kimel v. Florida Board of Regents, 528 U.S. 62 (2000); and Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984)(although express language of Eleventh Amendment only forbids suits by citizens of other States against a State, Eleventh Amendment bars suits against a State filed by its own citizens). Under Pennhurst State School & Hospital v. Halderman, *supra*, 465 U.S. at 99 & n. 9, a State must expressly consent to suit in a federal district court. The State of South Carolina has not consented to suit in a federal court. *See* South Carolina Tort Claims Act, § 15-78-20(e), South Carolina Code of Laws (statute expressly provides that the State of South Carolina does not waive Eleventh Amendment immunity, consents to suit only in a court of the State of South Carolina, and does not consent to suit in a federal court or in a court of another State). The Defendant SCDC should be dismissed as a party defendant in this case.

The complaint also names Jon Ozmint, the director of SCDC, as a defendant. The complaint, however, does not allege any facts that implicate personal involvement of the SCDC director in Plaintiff's stated "problem of being falsely arrested, unlawfully imprisoned, and all of the

constitutional rights that have been violated.” The only mention of the director is in a request for “the court to make Newberry County and SCDC along with Director Jon Ozmint, provide the answers directly to the federal court.” The mere mention of the SCDC director, without any factual allegations as to how he is alleged to be involved in the deprivation of Plaintiff’s federal rights, is not sufficient to state a cause of action against him. *See Weller v. Dep’t of Social Servs.*, 901 F.2d 387, 397 (4th Cir. 1990) (upholding district court’s dismissal of defendants where no allegations were made against them or suggested that defendants “played any part in the alleged violation”). The Defendant Jon Ozmint should be dismissed as a party defendant in this case.

The complaint also names Newberry County as a defendant. In order to state a claim for damages under 42 U.S.C. § 1983, an aggrieved party must sufficiently allege that he was injured by “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” by a “person” acting “under color of state law.” *See* 42 U.S.C. § 1983; *Monroe v. Page*, 365 U.S. 167 (1961). A local governing body, such as Newberry County, is a “person” that can be sued pursuant to § 1983 if the alleged unconstitutional action puts into effect the governing body’s policy or custom. *Monell v. Department of Social Servs.*, 436 U.S. 658, 690-91 (1978). If the alleged constitutional deprivations are not an official act of the county, only individuals may be liable under § 1983. *Hughes v. Blankenship*, 672 F.2d 403, 405-06 (4th Cir. 1982). Plaintiff’s allegations against the Defendant Newberry County fail to name a policy or establish a custom by Newberry County that deprives Plaintiff of a federal right. Although Plaintiff does not name individual employees of the County, to the extent Plaintiff relies on the doctrine of respondeat superior, this doctrine is generally not applicable to § 1983 actions. *See Polk County v. Dodson*, 454 U.S. 312, 325 (1981) (“Section 1983 will not support a claim based on a respondeat superior theory of liability.”) (citing *Monell v.*

Dep't of Social Servs., 436 U.S. 658, 694 (1978)); Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999) ("municipalities are not liable pursuant to respondeat superior principles for all constitutional violations of their employees simply because of the employment relationship") (citing Monell, 436 U.S. at 692-94). A municipality may not be held liable under § 1983 solely because it employs the tort-feasor; rather, a plaintiff must identify a municipal "policy" or "custom" that caused the plaintiff's injury. Board of County Commissioners v. Brown, 520 U.S. 397 (1997). Plaintiff fails to name a policy or custom of Newberry County that deprived him of a federal right, thus he fails to state a claim against the county. The Defendant Newberry County should be dismissed as a party defendant in this case.

Beyond the issue of failure to state a claim against the named defendants, the Plaintiff's request for money damages for illegal imprisonment is subject to the holding of Heck v. Humphrey, 512 U.S. 477 (1994). In Heck, the Supreme Court held that in order to recover damages for imprisonment in violation of the constitution, the imprisonment must first be successfully challenged.

We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm whose unlawfulness would render a conviction or sentence invalid, . . . a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

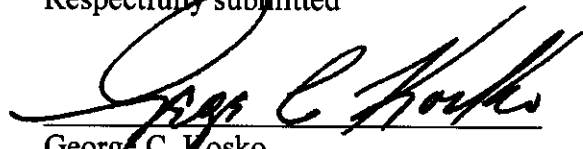
Id., 512 U.S. at 486-87. Plaintiff does not allege that he has successfully challenged his imprisonment, so he is barred at this time from bringing a § 1983 action for damages based on illegal imprisonment.

In as much as the complaint could be construed to request release from prison, § 1983 is not an appropriate action. Plaintiff contends he was only sentenced to two escape charges, while SCDC records indicate three escape charges, increasing the length of his sentence. Sentencing issues which could impact the duration of confinement, must be brought in a habeas action. Preiser v. Rodriguez, 411 U.S. 475 (1973). With respect to his convictions and sentence, the petitioner's sole federal remedies are a writ of habeas corpus under 28 U.S.C. § 2241 and a writ of habeas corpus under 28 U.S.C. § 2254, which can be sought only after exhaustion of state court remedies. *See* 28 U.S.C. § 2254(b); Picard v. Connor, 404 U.S. 270 (1971); Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 490-491 (1973)(exhaustion also required under 28 U.S.C. § 2241).

Recommendation

Accordingly, it is recommended that the District Court dismiss the complaint in the above-captioned case *without prejudice* and without issuance and service of process. *See* Denton v. Hernandez, *supra*; Neitzke v. Williams, *supra*; Haines v. Kerner, *supra*; Brown v. Briscoe, 998 F.2d 201, 202-204 & n. * (4th Cir. 1993); Boyce v. Alizaduh, *supra*; Todd v. Baskerville, *supra*, 712 F.2d at 74; 28 U.S.C. § 1915A [as soon as possible after docketing, district courts should review prisoner cases to determine whether they are subject to summary dismissal]. The plaintiff's attention is directed to the notice on the following page.

Respectfully submitted


George C. Kosko
United States Magistrate Judge

April 22, 2005
Charleston, South Carolina

Notice of Right to File Objections to Magistrate Judge's "Report and Recommendation"
&
The Serious Consequences of a Failure to Do So

The parties are hereby notified that any objections to the attached Report and Recommendation (or Order and Recommendation) must be filed within **ten (10) days** of the date of service. 28 U.S.C. § 636 and Fed. R. Civ. P. 72(b). The time calculation of this ten-day period excludes weekends and holidays and provides for an additional three days for filing by mail. Fed. R. Civ. P. 6. A magistrate judge makes only a recommendation, and the authority to make a final determination in this case rests with the United States District Judge. See Mathews v. Weber, 423 U.S. 261, 270-271 (1976); and Estrada v. Witkowski, 816 F. Supp. 408, 410 (D.S.C. 1993).

During the period for filing objections, **but not thereafter**, a party must file with the Clerk of Court specific, written objections to the Report and Recommendation, if he or she wishes the United States District Judge to consider any objections. Any written objections must **specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections**. See Keeler v. Pea, 782 F. Supp. 42, 43-44 (D.S.C. 1992); and Oliverson v. West Valley City, 875 F. Supp. 1465, 1467 (D.Utah 1995). Failure to file specific, written objections shall constitute a waiver of a party's right to further judicial review, including appellate review, if the recommendation is accepted by the United States District Judge. See United States v. Schronce, 727 F.2d 91, 94 & n. 4 (4th Cir.), *cert. denied*, Schronce v. United States, 467 U.S. 1208 (1984); and Wright v. Collins, 766 F.2d 841, 845-847 & nn. 1-3 (4th Cir. 1985). Moreover, if a party files specific objections to a portion of a magistrate judge's Report and Recommendation, but does not file specific objections to other portions of the Report and Recommendation, that party waives appellate review of the portions of the magistrate judge's Report and Recommendation to which he or she did not object. In other words, a party's failure to object to one issue in a magistrate judge's Report and Recommendation precludes that party from subsequently raising that issue on appeal, even if objections are filed on other issues. Howard v. Secretary of HHS, 932 F.2d 505, 508-509 (6th Cir. 1991). See also Praylow v. Martin, 761 F.2d 179, 180 n. 1 (4th Cir.) (party precluded from raising on appeal factual issue to which it did not object in the district court), *cert. denied*, 474 U.S. 1009 (1985). In Howard, *supra*, the Court stated that general, non-specific objections are *not* sufficient:

A general objection to the entirety of the [magistrate judge's] report has the same effects as would a failure to object. The district court's attention is not focused on any specific issues for review, thereby making the initial reference to the [magistrate judge] useless. * * * This duplication of time and effort wastes judicial resources rather than saving them, and runs contrary to the purposes of the Magistrates Act. * * * We would hardly countenance an appellant's brief simply objecting to the district court's determination without explaining the source of the error.

Accord Lockert v. Faulkner, 843 F.2d 1015, 1017-1019 (7th Cir. 1988), where the Court held that the appellant, who proceeded *pro se* in the district court, was barred from raising issues on appeal that he did not specifically raise in his objections to the district court:

Just as a complaint stating only 'I complain' states no claim, an objection stating only 'I object' preserves no issue for review. * * * A district judge should not have to guess what arguments an objecting party depends on when reviewing a [magistrate judge's] report.

See also Branch v. Martin, 886 F.2d 1043, 1046 (8th Cir. 1989) ("no de novo review if objections are untimely or general"), which involved a *pro se* litigant; and Goney v. Clark, 749 F.2d 5, 7 n. 1 (3rd Cir. 1984) ("plaintiff's objections lacked the specificity to trigger *de novo* review"). **This notice, hereby, apprises the parties of the consequences of a failure to file specific, written objections.** See Wright v. Collins, *supra*; and Small v. Secretary of HHS, 892 F.2d 15, 16 (2nd Cir. 1989). Filing by mail pursuant to Fed. R. Civ. P. 5 may be accomplished by mailing objections addressed as follows:

Larry W. Propes, Clerk
 United States District Court
 P. O. Box 835
 Charleston, South Carolina 29402